F.B.I. V. FAZAGA: THE SECRET OF THE STATE-SECRETS PRIVILEGE

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INTRODUCTION

When the government successfully invokes the state-secrets privilege, it allows for evidence to be excluded from trial if making that evidence public would threaten national security.[1] It is unclear, however, under what circumstances this privilege can be invoked, what happens when it is successfully invoked, and what occurs after the evidence is excluded. In *Federal Bureau of Investigation v. Fazaga*, the Supreme Court will have the opportunity to clarify the state-secrets privilege. Additionally, the Court will be asked to determine whether the Foreign Intelligence Surveillance Act of 1978 (FISA) displaces this privilege when the government invokes it regarding evidence obtained through electronic surveillance of U.S. nationals.[2] Petitioners argue that when this privilege is successfully invoked, courts must dismiss the case if continuing the litigation would threaten to disclose the privileged information.[3] Respondents counter that dismissal is only proper where the accusing party cannot successfully make its case without the privileged information.[4]

The Court should affirm the Ninth Circuit's decision and hold that FISA displaces the state-secrets privilege when the privileged evidence

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1. *See General Dynamics Corp. v. United States* 563 U.S. 478, 485 (2011) (explaining that the state-secrets privilege is an evidentiary privilege that allows for the exclusion of privileged information).

2. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat 1783 (codified as amended in scattered sections of 50 U.S.C.).

3. Brief for the Petitioners at 4, F.B.I. v. Fazaga, No. 20-828 (U.S. filed Dec. 19, 2020) [hereinafter Brief for the Petitioners].

4. Brief for the Respondents at 3, F.B.I. v. Fazaga, No. 20-828 (U.S. filed Sept. 21, 2021) [hereinafter Brief for the Respondents].

was obtained via electronic surveillance of U.S. nationals.[5] Congress passed FISA to correct for the executive branch potentially abusing its power in conducting electronic surveillance.[6] FISA's procedures advance national security interests while letting plaintiffs maintain their claims when possible. Here, it is unjust to prevent Respondents from claiming that the government violated their constitutional right to freedom of religion simply because the government aims to use evidence of the violation in its own defense.

I. FACTS

The facts in this case are limited because the Government has moved to withhold much of the record under the state-secrets privilege. The pleaded facts are as follows. The Federal Bureau of Investigation ("FBI") used a confidential informant to gather intelligence on the Muslim community in Southern California.[7] The FBI told the informant to infiltrate the Muslim community to target Muslims because of their religion.[8] The FBI gathered information using this informant in several ways: the informant's face-to-face meetings with members of the Muslim community, video and audio recordings the informant took surreptitiously, and planted audio listening devices hidden by the informant in the home and office of two specific members of the Muslim community.[9] The Government acknowledges that it employed this informant and that it possess the recordings he made.[10] The FBI also instructed the informant to attempt to incite violence.[11] When the informant attempted to incite violence, members of the Muslim community reported his actions to the appropriate government agency—which incidentally happened to be the FBI.[12]

5. *See* Fazaga v. Fed. Bureau of Investigation, 916 F.3d 1202,1230 (9th Cir. 2019), opinion amended and superseded on denial of reh'g, 956 F.3d 1015 (9th Cir. 2020) ("[I]n enacting FISA, Congress displaced the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA's purview.").

6. *See* S. Rep. 95-604, pt. 1, at 7 (1977) ("This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused.").

7. Brief for the Respondents, *supra* note 4, at 1.

8. *Id.*

9. Brief for the Petitioners, *supra* note 3, at 7–8.

10. *Id.*

11. Brief for the Respondents, *supra* note 4, at 1.

12. Brief for the Respondents, *supra* note 4, at 1.

II. PROCEDURAL HISTORY

Plaintiffs, now Respondents, asserted religious freedom claims under the Free Exercise and Establishment Clauses, along with Fourth Amendment wrongful search claims, and a FISA claim.[13] Before the district court, the defendants, now Petitioners, formally asserted the state-secrets privilege to defend against the religious freedom claims but not the unlawful search claims.[14] The district court upheld the state-secrets privilege and applied it to both the search claims and the religion claims, resulting in all but the FISA claim being dismissed.[15] The district court applied the state-secrets privilege because it found that disclosing the information contained in the electronic surveillance would jeopardize national security.[16] The district court then held that continuing the litigation would greatly risk the disclosure of this information, so dismissal was required.[17]

The Ninth Circuit reversed in part and remanded to the district court, determining that the district court erred in holding *sua sponte* that the Fourth Amendment claims warranted dismissal under the state-secrets privilege.[18] The Ninth Circuit also held that FISA's § 1806(f) procedures displace the state-secrets privilege and its corresponding dismissal remedy in cases involving electronic surveillance.[19]

III. LEGAL HISTORY

A. The State-Secrets Privilege

"State secrets" is comprised of two doctrines—the state secrets privilege and the secrecy required by government contracts. In *General Dynamics Corp. v. United States*,[20] the Supreme Court clarified that these were separate doctrines, noting that the state-secrets privilege

13. Brief for the Respondents, *supra* note 4, at 13. Respondents alleged illegal searches under the Fourth Amendment, and unconstitutional targeting of religion under the First and Fifth Amendments. (We need a cite for the second sentence here)

14. Brief for the Respondents, *supra* note 4, at 13–15.

15. *See* Fazaga v. F.B.I., 884 F. Supp. 2d. 1022, 1049 (C.D. Cal. 2012) (applying state-secrets privilege to both the religion claims and Fourth Amendment search claims). The Government had not sought to use the state-secrets privilege to dismiss the search claims, but the district court chose to apply it unilaterally.

16. *Id.* at 1042.

17. *Id.*

18. *Id.* at 1043.

19. *Id.* at 1052.

20. 563 U.S. 478 (2011).

was established in *United States v. Reynolds*[21] and the doctrine arising out of government contracts was explained in *Totten v. United States*.[22]

The *Reynolds* state-secrets privilege applies the procedural rules of evidence to determine if courts must exclude privileged evidence from trial for the sake of national security.[23] The term that covers privileged national security information—"state secrets"—is undefined. But the term has been held to include information that if made public would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments," or where disclosure would otherwise harm national security.[24] The government must formally assert this privilege.[25] If the government successfully invokes this privilege, then the privileged information is excluded from trial, and the trial must go on without it.[26]

The separate doctrine established in *Totten* was designed to deal with disputes arising out of government contracts, and therefore it has a distinctly different remedy than the state-secrets privilege.[27] In *Totten*, the Court relied upon the principle of confidentiality and described the kinds of relationships that are considered protected: spousal, client and legal counsel, and doctor and patient.[28] The Court then extended this reasoning to cover government contracts, stating that "[m]uch greater reason exists for the application of the principle to cases of contract for secret services with the government."[29] This focus on confidentiality and protected relationships explains why the remedy under this doctrine is far broader than the remedy under the state-secrets privilege. The *Totten* bar allows for dismissal of the case if continuing the case would put the privileged information at risk of becoming public.[30] Therefore, *Totten* allows for a case to be dismissed at the pleading stage, unlike the state-secrets privilege.[31]

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21. 345 U.S. 1 (1953).
22. 92 U.S. 105 (1875).
23. *See Gen. Dynamics*, 563 U.S. at 485 ("*Reynolds* was about the admission of evidence. . . . [P]rivileged information is excluded and the trial goes on without it.").
24. Black v. United States, 62 F.3d 1115, 1118 (8th Cir. 1995) (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983)).
25. *Reynolds*, 345 U.S. at 7.
26. *Gen. Dynamics*, 563 U.S. at 485.
27. *Id.*
28. Totten v. United States, 92 U.S. 105, 107 (1875).
29. *Id.*
30. *Id.*
31. *See* Tenet v. Doe, 544 U.S. 1, 9 (2005) (quoting *Reynolds* and distinguishing *Reynolds* and *Totten*, finding that *Reynolds* did not replace the remedy in *Totten* in cases involving spying).

B. Foreign Intelligence Surveillance Act of 1978 (FISA)

The Foreign Intelligence Surveillance Act of 1978 ("FISA")[32] regulates when and how the government can conduct electronic surveillance in the United States for foreign intelligence purposes.[33] Section 1806(c) of FISA requires the government to notify the court and "aggrieved persons," meaning people who are being surveilled, whenever it intends to use information obtained through electronic surveillance in litigation.[34] Section 1806(f) then establishes the procedures for judicial review of this information.[35] The court must review, in a private hearing, the government's order for withholding the evidence and any other material needed to determine if the surveillance was authorized and conducted lawfully.[36] Section 1810 creates a civil remedy for any U.S. person who has been unlawfully surveilled.[37]

The Supreme Court has not spoken on whether FISA's § 1806(f) procedures displace the state-secrets privilege. Lower courts are divided. In *ACLU Found. of S. California v. Barr*[38] the U.S. Court of Appeals for the D.C. Circuit found that "Congress gave the FISA court original and exclusive jurisdiction to decide whether the government should be permitted to conduct electronic surveillance of foreign powers and their agents" after ex parte proceedings.[39] Yet the Fourth Circuit recently came out differently in *Wikimedia Found. V. Nat'l Sec. Agency/Cent. Sec. Serv.*, determining that FISA did not displace the state-secrets privilege.[40] There, the Fourth Circuit determined that FISA's § 1806(f) procedures only apply when the government seeks to use privileged evidence in a proceeding.[41]

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32. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat 1783 (codified as amended in scattered sections of 50 U.S.C.).

33. *See* S. Rep. 95-604, pt. 2, at 1 (1977) ("[T]o authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information . . . .").

34. 50 U.S.C. § 1806(c).

35. 50 U.S.C. § 1806(f).

36. *Id.*

37. 50 U.S.C. § 1810.

38. 952 F.2d 457 (D.C. Cir. 1991).

39. *Id.* at 469.

40. *See* Wikimedia Found. v. Nat'l. Sec. Agency/Cent. Sec. Serv., 14 F.4th 276, 301 (4th Cir. 2021) ("Accordingly, we conclude that § 1806(f) doesn't displace the state secrets privilege, even in actions pertaining to government-run electronic surveillance.").

41. *Id.* at 296.

IV. PETITIONERS' ARGUMENT

Petitioners argue that the Ninth Circuit erred when it held that FISA § 1806 displaces the state-secrets privilege.[42] First, Petitioners examine whether the Government intends to use the privileged evidence at trial, asserting that if the Government does not intend to use the evidence § 1806 is not triggered.[43] Second, Petitioners look at the motion filed by Respondents, and argue that because the motion is a prayer for relief and not a procedural motion, it does not fall under the purview of § 1806.[44] Third and finally, Petitioners state that FISA does not displace the state-secrets privilege in the first place.[45]

First, Petitioners assert that the Government does not intend to use the protected evidence in court, and so § 1806 procedures are not applicable.[46] Petitioners claim that § 1806(f) establishes the procedures used to determine if evidence derived from electronic surveillance is admissible in court when the government seeks to use this evidence against an aggrieved person.[47] According to Petitioners, because the Government does not wish to use any of this evidence, § 1806(f) does not apply.[48] Petitioners point out that the Government sought dismissal of Respondents' claims to prevent privileged information from coming to light during litigation.[49] According to Petitioners, this is not the same thing as the Government stating its intent to enter the privileged information into evidence.[50] Instead, Petitioners argue, this is the Government using the state-secrets privilege for its intended purpose, ensuring national security by protecting privileged information.[51]

Petitioners also explain that just because their successful invocation

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42. Brief for the Petitioners, *supra* note 3, at 21.

43. *Id.* at 21–22.

44. *Id.* at 28–29.

45. *Id.* at 35–36.

46. *See id.* at 22 ("Because the government has not stated any intent to introduce any such evidence in this case, and respondents have not filed a motion to suppress or any similar motion concerning the admissibility of such evidence, Section 1806(f)'s procedures have no application here.").

47. *Id.* at 21–22.

48. *See supra* note 46 (explaining Petitioners' reasoning as to why Section 1806(f) should not apply).

49. *See id.* at 25 ("The government invoked the state-secrets privilege for the same reason that any party asserts any evidentiary privilege: to *prevent* the introduction or disclosure of the privileged information.").

50. *Id.* at 26.

51. *See id* at 37. ("There is no sound basis to infer that, by providing a government-protective means for determining the admissibility of FISA-obtained or FISA-derived evidence in a legal proceeding, Congress also implicitly precluded the government from *excluding* privileged evidence for national-security purpose.").

of the state-secrets privilege here will result in the case being dismissed does not mean that § 1806(f) procedures are triggered.[52] They state that if the state-secrets privilege is successfully invoked, the entire case may be dismissed if further litigation would threaten to expose the privileged information.[53] Petitioners emphasize that just because the government wants to keep certain information from coming to light for the sake of national security does not mean the government has any intent to use that information as evidence, which is what is required to trigger § 1806(f) procedures.[54]

Second, Petitioners argue that Respondents did not take any actions that independently trigger § 1806(f) procedures. Petitioners argue that only procedural motions can be decided properly using § 1806(f) procedures, and that a prayer for relief is not a procedural motion.[55] Therefore, Petitioners assert that Respondents' requested relief— to destroy or obtain any information gathered as part of the FBI surveillance—did not trigger § 1806(f) procedures.[56]

Third, Petitioners argue that even when FISA applies, it does not displace the state-secrets privilege.[57] According to Petitioners, Congress did not intend to preempt the government from relying on the state-secrets privilege when Congress passed FISA.[58] The Petitioners point out that the state-secrets privilege is not mentioned by name in FISA and argue that FISA and the state-secrets privilege can co-exist.[59] Moreover, Petitioners contend that if there is concern that FISA and the state-secrets privilege cannot co-exist, such concern must be decided in favor of the state-secrets privilege.[60] According to Petitioners, this is because the state-secrets privilege is constitutionally derived and originates in the Executive's Article II duties to protect national security and conduct foreign affairs, which necessarily include protecting military and diplomatic secrets.[61]

52. *See id.* at 26 (relying on Totten v. United States, 92 U.S. 105, 107 (1875) to argue that "invoking the state-secrets privilege to remove evidence may result, as it did here, in dismissal of a claim if further litigation would threaten to reveal state secrets."

53. *Id.* at 27.

54. *Id.* at 26-27.

55. *Id.* at 29.

56. *See id.* (arguing that because Respondents asked for relief, their motion was not procedural and therefore § 1806(f) procedures do not apply).

57. *Id.* at 35.

58. *Id.* at 35–36.

59. *Id.* at 36.

60. *Id.* at 42.

61. See *id.* at 42–44 (arguing that within the executive power over foreign affairs granted to the President by Article II of the Constitution lies the ability to safeguard state secrets).

V. RESPONDENTS' ARGUMENT

Respondents argue that the Ninth Circuit was correct in holding that the district court erred for two reasons.[62] First, Respondents allege the state-secrets privilege authorizes the exclusion of evidence, but it does not require dismissal of a case unless the plaintiffs are unable to prove their case without the excluded evidence.[63] Second, even if the state-secrets privilege supported dismissal, Respondents posit that because the secret information on which the Petitioners rely came from electronic surveillance of U.S. nationals located inside the U.S., FISA's § 1806(f) procedures displace the privilege.[64]

First, Respondents argue that the state-secrets privilege "authorizes only the exclusion of evidence, not the use of secret evidence to dismiss claims."[65] Instead of the typical state-secrets paradigm, under which the privilege prevents plaintiffs from using certain evidence,[66] in the case *sub judice,* the Government is claiming that the court should dismiss Respondents' case because the Government plans to use state secret information in its defense.[67] Respondents state that they do not need this secret evidence to make their claim;[68] the only party that needs the evidence is the Government—which claims that the evidence in question cannot be used in litigation.

Respondents explain how § 1806(f) sets out requirements for in camera and ex parte review under two situations that are applicable here. When the government wishes to use information obtained from electronic surveillance and in situations wherein U.S. nationals sue the government plausibly alleging that they were unlawfully surveilled, the statutory provision may apply.[69] Here, Respondents argue, the government is using the privileged evidence as part of its defense, corresponding to § 1806(c), which then triggers § 1806(f) and its procedures.[70] Moreover, Respondents are U.S. nationals suing the government after being electronically surveilled and they have sought access to the evidence produced by that surveillance, which triggers §

62. Brief for the Respondents, *supra* note 4, at 19–21.
63. *Id.* at 20.
64. *Id.* at 21.
65. *Id.* at 20.
66. *See id.* at 3. (noting that in a typical state-secrets privilege assertion, the government claims that the information it needs to use to make its own case is protected by the privilege).
67. *Id.* at 19–20.
68. *Id.* at 19.
69. *Id.* at 21.
70. *Id.* at 21–22; 50 U.S.C. § 1806(c),(f).

1806(f) independently.[71]

Respondents argue, therefore, that the Court must apply § 1806(f) procedures and conduct in camera and ex parte review to determine if the Government conducted its surveillance lawfully.[72] Respondents claim that the case can only be dismissed at this stage if the Court concludes that the Government acted lawfully and did not violate Respondents' Free Exercise and Establishment Clause claims.[73] Respondents support this claim by relying on a D.C. Circuit decision, *Molerio v. Federal Bureau of Investigation*, in which the court determined that formally asserting the state-secrets privilege is not enough to guarantee dismissal.[74] Instead, the D.C. Circuit noted that "the validity of the government's assertion must be judicially assessed."[75]

Second, Respondents posit that when FISA applies, it displaces the dismissal remedy of the state-secrets privilege.[76] Respondents argue that in enacting FISA, Congress created a comprehensive and exclusive framework for the litigation of cases involving domestic electronic surveillance evidence.[77] More importantly, Respondents note that Congress passed FISA after the Church Committee[78] found that the federal government had abused its authority to electronically surveil U.S. nationals.[79] The Respondents highlight that FISA's purpose is to establish rules for domestic surveillance and grant the judiciary the authority to ensure they are properly followed.[80] Therefore, according to Respondents, in situations in which FISA applies, the Act supplants the state-secrets privilege, and courts must use FISA's procedures of in camera and ex parte review of the evidence.

Respondents also deny that the state-secrets privilege creates an issue under Article II of the Constitution.[81] Respondents contend that

71. Brief for the Respondents, *supra* note 4, at 22.
72. *Id.* at 31.
73. *Id.*
74. 749 F.2d 815, 821 (D.C. Cir. 1984).
75. *Id.* at 822.
76. *Id.* at 33.
77. *Id*.
78. *Id. See also* S. Res. 21, 94th Cong. (1975) (enacted) (establishing the Church Committee). The Church Committee was a 1975 Senate committee that investigated and identified numerous abuses of surveillance by the CIA, FBI, IRS, and NRA.
79. Brief for the Respondents, *supra* note 4, at 5.
80. *Id.* at 4–5.
81. *See id.* at 61 (rejecting Petitioners' argument that the state-secrets privilege was incorporated into the penumbra of Article II of the Constitution).

there is no evidence that "the Founders implicitly incorporated the state-secrets privilege into the penumbras of Article II."[82] Consequently, Respondents assert, there is no constitutional conflict in allowing FISA to displace the state-secrets privilege.

In sum, Respondents argue that the state-secrets privilege itself does not allow for the dismissal of their claim at this stage. Moreover, Respondents state that even if it did, such dismissal would be of no consequence, because FISA would displace the state-secrets privilege and require the evidence to be reviewed under FISA's procedures.

VI. ANALYSIS

The Court can clarify the state-secrets doctrine by accomplishing three related tasks. It must (1) define the boundaries of the state-secrets privilege, (2) identify when, if ever, dismissal is a proper remedy in state-secrets cases, and (3) determine if the Foreign Intelligence Surveillance Act of 1978 (FISA) displaces the state-secrets privilege here. To accomplish the first task—defining the boundaries of the privilege—the Court should state whether *Totten* is part of the state-secrets privilege or a separate doctrine. As to the second task, the Court should make clear whether dismissal of a case is proper after evidence is excluded due to the state-secrets privilege. Respondents argue that this privilege can only exclude evidence that plaintiffs seek to use, meaning that if plaintiffs rely on other evidence the case would not need to be dismissed.[83] Petitioners, however, posit that if the evidence in question is needed for a defense, or is at risk of coming out publicly if litigation continues, then the entire case should be dismissed.[84] Finally, to address the third task, the Court should determine that FISA displaces the state-secrets privilege here, both as a matter of statutory construction, and as a means of maintaining the separation of powers.

First, the Court must define the boundaries of the state-secrets doctrine by clarifying that the *Totten* bar for government contracting information is a separate doctrine. Petitioners argue that the doctrines are two sides of the same coin.[85] But the Supreme Court's holding in

82. *Id.*

83. Brief for the Respondents, *supra* note 4, at 19–20.

84. *See* Brief for the Petitioners, *supra* note 3, at 26 (arguing that the government can properly invoke the state-secrets privilege because further litigation would put state secrets at risk of becoming public).

85. *See* Brief for the Petitioners, *supra* note 3, at 5 (relying on Totten as part of the state-secrets privilege analysis, then citing to Reynolds in the next sentence, and not making any distinction between the two).

General Dynamics Corp. v. United States makes clear that in fact, they are two distinct doctrines that apply in different scenarios.[86] The *Totten* bar applies when there are disputes involving government contracts.[87] The state-secrets privilege is an evidentiary privilege arising out of common law.[88]

Addressing the first issue naturally leads to the second issue: whether dismissal is an appropriate remedy. As the Court made clear in *General Dynamics*, under the state-secrets privilege, dismissal is only an option if the *plaintiff* cannot make its case without the privileged evidence.[89] The appropriate remedy under the state-secrets doctrine is excluding the privileged information and continuing the trial without it.[90] By contrast, a court applying the *Totten* bar has broader discretion to dismiss the case. Under the *Totten* bar, a court may dismiss the case if continuing the litigation poses a risk of the privileged evidence coming to light.[91] This risk is not predicated on the plaintiff relying on the evidence to make its case. If litigation is likely to cause the protected evidence to be revealed, the entire case can be dismissed at the pleading stage.[92]

Third and finally, the Court should hold that FISA displaces the state-secrets privilege for matters of electronic surveillance of U.S. nationals. This result best comports with statutory language of FISA, and to hold otherwise would usurp the judiciary's proper role in checking the executive branch, as well as ignore the authority of the legislative branch. In enacting FISA, Congress exercised its legislative power in "response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused."[93] Congress aimed to ensure that the executive branch would not have the final say in determining if circumstances justify electronic surveillance of U.S. nationals.[94] To do this, Congress chose to create a

86. Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485–86 (2011).

87. *See id.* at 486–87 (asserting that the Court's state-secrets jurisprudence arises from "two cases dealing with alleged contracts to spy").

88. *Id.* at 485.

89. *See id.* at 484–85 ("If the [g]overnment refuses to provide state-secret information that the accused reasonably asserts is necessary to his defense, the prosecution must be dismissed.").

90. *Id.* at 485.

91. Totten v. United States 92 U.S. 105, 107 (1875).

92. *See id.* at 105–07 (holding that an action could not be successfully brought against the government if doing so would reveal confidential information).

93. S. REP. NO. 95-604, pt. 1, at 4 (1977).

94. *See id.* (describing the abuses of electronic surveillance committed by the executive that prompted the enactment of FISA).

civil damages remedy,[95] and require district courts to use ex parte in camera review.[96]

Petitioners caution that to supplant the state-secrets privilege with FISA procedures would be a constitutional violation because they ground the state-secrets privilege in the executive's Article II powers.[97] But the true constitutional concern is not that the judiciary will usurp the executive branch's power, but rather that the executive will usurp both the judiciary and the legislative branches' roles. The state-secrets privilege, when applied, allows the executive to exercise control over what is admissible in court. This power is checked by the judiciary's ability to assess the validity of the government's assertion,[98] as well as the legislature's ability to pass laws. Here, the legislature has exercised its power by promulgating FISA, and the judiciary has exercised its role by applying FISA's procedures to the matter at hand. To allow the executive to prevent FISA from being properly applied to this case would be to privilege one branch over the others.

VII. ORAL ARGUMENT

During oral argument, the justices made clear that they were looking for the narrowest possible holding in this case. Several of the justices expressed concern about whether the Supreme Court should be dealing with the state-secrets issue at this stage, or if that question should be decided by a lower court on remand.[99] Moreover, several of the justices, including Justice Kagan, were conflicted about determining if FISA displaces the state-secrets privilege without first clarifying what the state-secrets privilege is and how it applies in this case.[100]

Justice Thomas began with one of the key issues in this case, asking counsel for the Petitioner if *Totten* and *Reynolds* are two separate tests or part of the same test.[101] Petitioners ' counsel stated that they were part of the same doctrine, and that *Totten* should not be confined solely

95. 50 U.S.C. § 1810.

96. 50 U.S.C. § 1806(f).

97. *See* Brief for the Petitioners, *supra* note 3, at 14 ("The court of appeals' decision has the startling consequence of transforming a limited provision of FISA that was designed to safeguard national-security information into a mechanism for overriding the Executive's invocation of the state-secrets privilege.").

98. Molerio v. F.B.I., 749 F.2d 815, 821–22 (D.C. Cir. 1984).

99. *See* Transcript of Oral Argument at 123, F.B.I. v. Fazaga (argued Nov. 8, 2021) (No. 20-828) (discussing the possibility of remand to determine the proper application of the state-secrets privilege).

100. *Id.* at 121.

101. *Id.* at 6.

to cases involving contracts.[102] Justice Gorsuch pointed out that Petitioners' position would force the Court to determine if FISA displaces the state-secrets privilege.[103] Justice Gorsuch was skeptical of Petitioners' position: he noted they were mixing *Totten* and *Reynolds*, and he further claimed that Petitioners' arguments led to the untenable conclusion that any time there is a secret the government can use that fact to get the suit dismissed.[104]

Justice Gorsuch went on to say that until the Court definitively defines the state-secrets privilege, it would be premature to say whether FISA displaces it.[105] To address whether FISA displaces the state-secrets privilege, the Court spent a great deal of time parsing the statutory language of § 1806 and § 1810. Petitioners' counsel contended that § 1806(f) provides the procedure for suppressing evidence when the government seeks to use it against an opposing party, and therefore cannot be triggered where the government does not seek to use the evidence to make its case.[106] When pressed by Justice Roberts as to why § 1806(f) would not be triggered by *any* "aggrieved party,"[107] Petitioners reiterated that § 1806(f) is a statutory codification of a regulatory suppression procedure, and therefore it can only be triggered by the government.[108]

Section 1806(c) also drew many questions from the Justices.[109] Petitioners argued that "otherwise use" means to use against the person in the proceeding, which the Government did not intend to do here.[110] Respondents instead argued that "otherwise use" means to use in a different manner, and that relying on information to win dismissal of a lawsuit is clearly an example of to "otherwise use."[111]

Ultimately, Justice Kagan laid out a possible approach—to frame the question as when dismissal is appropriate in a state-secrets case.[112]

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102. *Id.* at 6–8.
103. *Id.* at 43.
104. *Id.*
105. *Id.* at 104.
106. *Id.* at 4–5.
107. It can be inferred that Justice Roberts was referring to the Respondents' prayer for relief here.
108. *Id.* at 13–14.
109. *See* 50 U.S.C. § 1806(c) (requiring notification by the government whenever it "intends to enter into evidence or otherwise use or disclose" information it wants to be covered by the state-secrets privilege).
110. Transcript of Oral Argument at 20–23, F.B.I. v. Fazaga (argued Nov. 8, 2021) (No. 20-828).
111. *Id.* at 64.
112. *Id.* at 120–21.

Justice Kagan then noted that the Ninth Circuit based its decision on an incorrect understanding of the state-secrets privilege and, based on this misunderstanding, improperly addressed whether dismissal is an appropriate remedy under the state-secrets doctrine. This led the Ninth Circuit to issuing an unnecessary decision regarding FISA's displacement of the state-secrets privilege.[113] Justice Kagan then asked counsel for the Respondents what the Court should do to ensure that the Ninth Circuit fixes its mistake regarding the state-secrets privilege, while also preventing the Ninth Circuit's erroneous FISA decision from remaining on the books.[114] Respondents reassured Justice Kagan that if the Court decided to go that route, it could vacate the Ninth Circuit's decision, then remand the case to address if dismissal is appropriate at the pleadings stage in light of the distinction between the *Totten* bar and the state-secrets doctrine.[115]

VIII. CONCLUSION

At stake for Respondents is their right to have their day in court, to make their case that the government violated their First Amendment right to religious freedom, and to hold the government accountable for constitutional violations. As Justice Gorsuch noted, the government is attempting to have its cake and eat it too by avoiding a judgment against it while keeping critical evidence secret.[116] Holding that FISA displaces the state-secrets privilege would honor Congress's intent behind FISA and allow Respondents to move forward under § 1806 procedures. Alternatively, the Court can accomplish this same goal by affirming that the *Totten* bar and *Reynolds* are two separate doctrines. Under that approach, the Court could clarify that dismissal is not the appropriate remedy in a state-secrets case. Because the Court seems inclined to avoid the FISA issue, it will likely remand the case to the Ninth Circuit with instructions to properly apply the state-secrets privilege and examine whether dismissal is appropriate at the pleading stage.

113. *Id.* at 121.
114. *Id.*
115. *Id.* at 121–123.
116. *See id.* at 43 (noting that by importing the *Totten* bar into the state-secrets doctrine the Government is avoiding making the usual choice between accepting a tort judgment as the cost for keeping the information secret or using the secret information to contest the tort).